

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

FILED

LUIGI LOPES,)
)
 Claimant,)
)
 vs.) Claim No. 20081351
)
 STATE OF TENNESSEE,)
)
 Defendant.)

MAY 15 2009
Tennessee Claims Commission
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ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Claimant, Luigi E. Lopes, brings this claim for damages related to his immigration status, which he complains occurred due to the negligence of personnel of the Office of International Programs and Services at Middle Tennessee State University ("MTSU"). As the jurisdictional basis for this claim, Mr. Lopes invokes the Commission's authority under Tenn. Code Ann. § 9-8-307(a)(1)(F) relative to the negligent care, custody or control of personal property; § 9-8-307(a)(1)(L) relative to breach of a written contract; § 9-8-307(a)(1)(N) relative negligent deprivation of statutory rights; and § 9-8-307(a)(1)(V) relative to unconstitutional taking of private property. Mr. Lopes seeks damages of \$300,000.

Pending before the Commission is the State's motion to dismiss, pursuant to Tenn. R. Civ. P. 12.02(1) and (6), for lack of subject matter jurisdiction and failure to state a claim for which relief can be granted and the claimant's response in opposition to the motion. Because the Commission concludes that Mr. Lopes' allegations concerning damage to his visa status caused by MTSU's negligence do not fall within its subject matter jurisdiction, the motion to dismiss is granted.

FACTUAL BACKGROUND

Luigi E. Lopes is a foreign national of Curacao in the Netherlands Antilles, residing in the U. S. Mr. Lopes enrolled in MTSU in 1999 to study economics and graduated with a master's degree in economics in May of 2007. While he was studying at MTSU, Lopes resided in the U. S. on a student visa (F-1) immigration authorization. Lopes had planned to graduate in September of 2006 and had applied for Optional Practical Training ("OPT"), which would extend his immigration status to permit him to work in the U. S. to train in his field of study. Lopes, however, did not maintain a 3.0 GPA, which meant that he needed an additional semester of study to obtain his degree. According to Mr. Lopes, he

contacted the International Programs and Services Office and advised them that he might require an additional semester to complete his studies.

In December of 2006, Lopes received notification from MTSU that he would have to re-enroll and complete an additional semester in order to graduate. He was also notified by the United States Customs and Immigrations Services ("USCIS") that he had been approved by MTSU for issuance of OPT immigration status. He received his OPT card on December 27, 2006. OPT status can only be granted once and signifies that the student's studies are completed and that he is out of the university and is engaged in employment for the approved period of time. OPT status commences on the date it is issued by the University and extends for twelve months.

Concerned about this error, Lopes brought it to the attention of Sandy Brandon, an administrator in the International Programs and Services Office. Brandon informed him that it would be impossible for MTSU to rescind the decision and instructed him to deal directly with the USCIS. Lopes subsequently called and met with immigration authorities, who informed him that his problem could be corrected, but that MTSU

would have to make the correction. The correction, he claims, would have been the issuance of an I-538 form, which would have permitted the return of the OPT card to USCIS.

Mr. Lopes completed his master's degree in the spring of 2007, and began looking for work. Although Mr. Lopes was offered a position with Renal Advantage in Brentwood, Tennessee, he lost this offer because his OPT card, which he contends was prematurely issued, had expired.

DISCUSSION

A motion to dismiss for lack of subject matter jurisdiction falls under Tennessee Rule of Civil Procedure 12.02(1). The concept of subject matter jurisdiction concerns a court's lawful authority to adjudicate a controversy brought before it. Subject matter jurisdiction involves the nature of the cause of action and the relief sought, and can only be conferred on a court by constitutional or legislative act. *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000).

A motion to dismiss for failure to state a claim for relief under Tenn. R. Civ. P. 12.02(6) tests only the legal sufficiency of the complaint, not the strength of a plaintiff's proof. Such a motion admits the truth of all

relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action. In considering a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994).

CLAIMS COMMISSION JURISDICTION

The State of Tennessee, as a sovereign, is immune from suit except as it consents to be sued. *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000).

The Claims Commission is a forum of limited jurisdiction and its authority to render damages against the State in contravention of its sovereign immunity is purely statutory. The Claims Commission's jurisdiction is limited to claims based on the acts or omissions of state employees, as defined in Tenn. Code Ann. § 8-42-101(3), which fall within certain categories. Tenn. Code Ann. § 9-8-307(a)(1). The categories of claims over which the Claims Commission has jurisdiction are set forth in Tenn. Code Ann. § 9-8-307. If a claim falls outside of the categories specified in § 9-8-

307(a), then the state retains its immunity from suit, and a claimant may not seek relief from the State. *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000).

The State argues that Mr. Lopes' claim for damages does not fall into any of the categories in Tenn. Code Ann. § 9-8-307(a) over which the Commission has subject matter jurisdiction. In response to the State's motion to dismiss, Mr. Lopes has identified the following statutes as the basis for the Commission's subject matter jurisdiction over this matter: Tenn. Code Ann. § 9-8-307(a)(1)(F) relative to the negligent care, custody or control of personal property; § 9-8-307(a)(1)(L) relative to breach of a written contract; § 9-8-307(a)(1)(N) relative negligent deprivation of statutory rights; and § 9-8-307(a)(1)(V) relative to unconstitutional taking of private property.

Negligent care, custody of control of personal property, Tenn. Code Ann. § 9-8-307(a)(1)(F); Negligent deprivation of statutory rights, Tenn. Code Ann. § 9-8-307(a)(1)(N).

Mr. Lopes contends that he has a vested "property right" in his OPT card status created by federal law, upon completion of the prerequisites outlined in the immigration law. This property right, he

argues, falls within the definition of “personal property” under Tenn. Code Ann. § 9-8-307(a)(1)(F). The Claims Commission Act does not define the term “personal property.” In *State ex rel. Elvis Presley Intern. Memorial Foundation v. Crowell*, 733 S.W.2d 89, 97 (Tenn.App.1987), the Court of Appeals noted that “[i]n its broadest sense, property includes all rights that have value. It embodies all the interests a person has in land and chattels that are capable of being possessed and controlled to the exclusion of others. Chattels include intangible personal property such as choses in action or other enforceable rights of possession.” *Id.* (citations omitted).

As the State notes in its reply, the cases construing this statute have heretofore involved care, custody or control of tangible, not intangible, personal property. However, even accepting Mr. Lopes’ more expansive reading of the statute, he has not demonstrated that he has a vested property right in his immigration status. An alien has no inherent property right in an immigrant visa. *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990). Mr. Lopes has not identified and the Commission’s review has not revealed, anything in the Immigration and Nationality Act, 8 U.S.C.A. § 1101 et seq. or the federal regulations, see 8 C.F.R. §

214.2(f)(10)(ii), that would create a property right in Mr. Lopes' immigration status. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1971). The Commission is not persuaded, even allowing for a liberal construction of § 9-8-307(a)(1)(F), *see Stewart v. State, supra*, that the legislature intended this statute to waive the State's sovereign immunity for injuries to property interests or other intangible personal property.

Moreover, to the extent to which Mr. Lopes alleges that he has been negligently deprived of statutory rights, Tenn. Code Ann. § 9-8-307(a)(1)(N), the Commission's jurisdiction is limited to statutory rights created under *Tennessee* law. His claims, which are based upon rights allegedly created under the Immigration and Nationality Act, a federal statute, are therefore outside of its subject matter jurisdiction. *See* Tenn. Code Ann. § 9-8-307(a)(1)(N).

Breach of a written contract,
Tenn. Code Ann. § 9-8-307(a)(1)(L)

The Claims Commission's jurisdiction over contract actions is limited to "[a]ctions for breach of a written contract between the claimant and the state which was executed by one (1) or more state officers or employees with authority to execute the contract...." Tenn. Code Ann. § 9-8-307(a)(1)(L). The Commission's exercise of jurisdiction under this provision requires a finding that: (1) there was a written contract between Mr. Lopes and MTSU; and (2) that the contract was executed by one or more state officers or employees with authority to execute the contract. Tenn. R. Civ. P 10.03 provides that a copy of such instrument is to be attached to the complaint. "Whenever a claim or defense is founded upon a written instrument other than a policy of insurance, a copy of such instrument or the pertinent parts thereof shall be attached to the pleading as an exhibit...." Tenn. R. Civ. P. 10.03. Mr. Lopes has not identified a written contract with the State executed by a state employee or officer with authority to execute a contract, which is necessary for the Commission's consideration of this claim. It is therefore dismissed.

Unconstitutional Taking of Property,
Tenn. Code Ann. § 9-8-307(a)(1)(V)

Finally, Mr. Lopes alleges that that the Commission has jurisdiction over his claim that MTSU negligently deprived him of his property right in his immigration status under Tenn. Code Ann. § 9-8-307(a)(1)(V) relative to claims for “[u]nconstitutional taking of private property, as defined in § 12-1-202, including intentional state governmental action resulting in a taking other than the taking of real property and real property rights for the state’s system of highways or the state’s system of interstate highways.” Tenn. Code Ann. § 12-1-202(2) defines “private property” as “real property, or improvements to real property.” Tenn. Code Ann. § 12-1-202(2) (1999). Because Mr. Lopes’ does not allege a taking of real property, however, the Claims Commission has no jurisdiction over this claim under Tenn. Code Ann. § 9-8-307(a)(1)(V).

CONCLUSION

Based on the foregoing considerations, the Commission finds that it lacks subject matter jurisdiction of this claim. It is therefore dismissed.

It is so **ORDERED** this the 15th day of May, 2009.

A handwritten signature in black ink, appearing to read 'Stephanie R. Reeves', written over a horizontal line.

STEPHANIE R. REEVERS
Claims Commissioner

CERTIFICATE OF SERVICE

This is to certify that I have mailed a true and correct copy of the foregoing document to the following parties:

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This 15 of May, 2009.

A handwritten signature in cursive script that reads "Marsha Richeson".

Marsha Richeson, Administrative Clerk
Tennessee Claims Commission